UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. **1:19-CR-00068 (NAM)**

BRANDON L. DUMAS,

Defendant.

APPEARANCES:

For United States of America:
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Hon. Norman A. Mordue, United States District Court Senior Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Defendant Brandon Dumas is charged with two counts of Distribution of Child Pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A), 2252A(b)(1), and 2256(8)(A); one count of Receipt of Child Pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A),

2252A(b)(1), and 2256(8)(A); and two counts of Possession of Child Pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(b) and 2256(8)(A), which involved images of child pornography involving one or more prepubescent minors and minors that had not attained twelve years of age in violation of 18 U.S.C. § 2252A(b)(2). (Dkt. No. 20). On May 17, 2019, Defendant filed a motion to suppress evidence and dismiss the Indictment. (Dkt. No. 47). Defendant claims that the search warrant was unconstitutionally overbroad, lacking in particularity, and unsupported by probable cause. (Dkt. No. 47-1). The Government opposes the motion. (Dkt. No. 50).

II. BACKGROUND

A. Events Prior to the Warrant Application

On September 29, 2017, an individual (the "Witness") contacted the FBI to report the potential sexual exploitation of a minor. (Dkt. No. 47-4, p. 8). The Witness reported that Defendant sent a picture of himself through the messaging feature of Facebook, with what appeared to be feces on his face. (*Id.*). When the Witness asked, "is that what I think it is," Defendant responded, "It sure is. All from my high school friend's 10 yr [sic] old son who I have been spending tons of time with," followed by a winking face emoji. (*Id.*, p. 13). Within one minute, Defendant sent the Witness a photograph of a minor male sitting on the chest of an individual wearing a grey tank top, immediately followed by the message: "Today." (*Id.*, p. 14). The minor male was naked from the waist-down, with his buttocks visible, and the face of the individual underneath him was obscured. (*Id.*). The Witness responded by writing, "i just dont underdtsnd u [sic]. shit stinks," and Defendant replied: "Nobody understands jack shit about anything. It's the fact that it ain't right which is so hot. Like playin w him for example. Just all of it." (*Id.*). The Witness did not respond, and three hours later, Defendant messaged the Witness again saying, "Jk [just kidding] just messing w you." (*Id.*). By that point, the Witness

had already reported Defendant's messages to the FBI. (*Id.*, p. 8). On October 5, 2017, FBI Special Agent David Fallon spoke with the Witness and verified the report. (*Id.*).

B. The Search Warrant Application

On October 5, 2017, Investigator Christopher R. Smith completed an application for a search warrant concerning Defendant. (*See* Dkt. No. 47-4, pp. 1–9). Investigator Smith began by explaining that he was an investigator with the Colonie Police Department ("CPD"), a task force officer with the FBI, and assigned to the CPD's Computer Crimes Unit and Child Exploitations Task Force. (*Id.*, p. 1). The application sought authorization to seize property: "believed to have been used to commit an offense against the laws of this state, to wit, violations of Articles 130/235/263/260 of the Penal Law of the State of New York," and which "constitutes evidence and tends to demonstrate that an offense was committed in this state, to wit, violations of Articles 130/235/263/260 of the State of New York." (*Id.*). The property included computers, computer data, discs and storage media, and other electronic devices. (*Id.*). The search locations were specified as Defendant's residence in Colonie, and his person and vehicles. (*Id.*, p. 2).

Investigator Smith then described his relevant training and prior experience with cases involving child pornography and sexually based offenses. (*Id.*, p. 3). Next, the application listed the following sections: 1) definitions of terms related to child pornography and computers; 2) background as to "child pornography and the internet"; 3) background as to "computers and the evidence assessment process in child pornography and child exploitation cases"; and 4) background as to "characteristics of collectors of child pornography." (*Id.*, pp. 3–7). Then, Investigator Smith provided an overview of the investigation, describing portions of the Facebook conversation detailed above. (*Id.*, p. 8). Investigator Smith stated that Defendant

"sent a picture via Facebook Messenger of himself wearing a grey tank top (only torso shown) and a white prepubescent male sitting on his chest," and that the minor male had "his buttocks exposed." (*Id.*). Investigator Smith did not include Defendant's later message that he was "just kidding." The application did attach the entire Facebook conversation. (*Id.*, pp. 10–16).

Investigator Smith wrote that, "based on [his] training and experience with child exploitation investigations, the language used by Dumas in the Facebook messages indicate[s] that he may be sexually abusing the juvenile male depicted in the images sent." (*Id.*, p. 8). In the section titled "conclusion and specific request," Investigator Smith wrote that, based on his investigation and the information provided, there was cause to believe that:

> [T]here is sexual abuse of a minor by Brandon L. Dumas and that a computer or computers located at 8 Breeman St., Albany/Colonie, NY 12205 . . . may contain images of child pornography, and that Brandon L. Dumas has made these images of child pornography available for distribution via the Internet, in violation of Articles 130/235/263/260 of the New York State Penal Law.

(Dkt. No. 47-4, pp. 8–9). Investigator Smith then detailed certain technical aspects of searching computers for evidence of child pornography. (*Id.*).

C. The Search Warrant

The search warrant was approved and issued on October 5, 2017 by a Town Justice of the local criminal court in Colonie. (*See* Dkt. No. 47-3). The warrant covered Defendant's residence, person, and vehicles, and authorized law enforcement to search for the following:

> The property referred to and authorized to be seized, searched, held, and subsequently examined is believed to contain evidence that will constitute, substantiate or support violations of Articles 130/235/263/260 of the Penal Law of the State of New York, and this property is further described as follows:
>
> 1. Any and all computers, computer program, computer data and/or computer network information as those terms are defined in Penal Law 156.00.
> 2. Any computers, central processing units, external and internal drives, storage units or media, terminals and video display units, together with peripheral

equipment such as keyboards, printers, modems, scanners, or digital cameras and their internal and external storage media.

3. Any and all computing or data processing software, or data including, but not limited to hard disks, floppy disks, magnetic tapes, and integral RAM or ROM units which may reveal evidence which substantiates violations of the aforementioned NY State Penal Law Statutes.
4. The following records and documents, whether contained or stored on the computer, cell phone, magnetic tape, cassette, CD disk, diskette, photo-optical device, or any other storage medium, in the form of internet history, SMS, MMS, IM:
   a. Any access numbers, passcodes, swipe code patterns, passwords, personal identification numbers (PINS), logs, notes, memoranda and correspondence relating to computer, electronic and voice mail systems, Internet addresses and/or related contacts.
   b. Any computing or data processing literature, including, but not limited to printed copy, instruction books, notes, papers, or listed computer programs, in whole or in part.
   c. Any audio or video cassette tape recordings, books, magazines, periodicals, or other recorded or printed material, the possession of which constitutes a violation of Article 263 of the Penal Law of the State of New York.
   d. Any and all photographs depicting sexual conduct by a child and/or minors engaged in sexually explicit conduct.
   e. Any records or correspondence relating to the possession, transmission, collection, trading, or production of the aforementioned photographs and/or videos.
5. Any internet capable device, such as cell phone, tablet, smartphone, gaming system that allows access to the internet and allows for the transmission of data in violation or [sic] articles 130/235/263/260 of the New York State Penal Law.

(Dkt. No. 47-3, pp. 1–2).

D. Execution of the Search Warrant

On October 6, 2017, members of the Albany FBI Child Exploitation Task Force, including Investigator Smith, executed the search warrant at Defendant's residence in Colonie. (Dkt. No. 1, p. 4). Defendant was advised that he was not under arrest, but that an investigation was being conducted regarding his activity on the Internet. (*Id.*). According to an affidavit from Agent Fallon in support of the Criminal Complaint, Defendant admitted that he smeared feces on his face and sent a picture to the Witness. (*Id.*). Defendant's counsel now claims that the substance was Nutella and part of a joke. (Dkt. No. 47-1, p. 6). According to Agent Fallon's

affidavit, Defendant also admitted that he sent the image of the minor male sitting on the chest of an unidentified individual, but denied that he was in the image, explaining that he found it "on the Internet." (*Id*.).

The officers seized Defendant's Apple iPhone and Apple Macbook Pro laptop computer and conducted a forensic investigation of the items. (Dkt. No. 47-5, p. 1). According to Agent Fallon's affidavit, the FBI laboratory found on Defendant's iPhone 13 images and 51 videos depicting children engaged in sexually explicit poses and/or conduct, and on Defendant's laptop, 79 images and 20 video file depicting children engaged in sexually explicit poses and/or conduct. (Dkt. No. 1, p. 5).

III. DISCUSSION

Defendant seeks to suppress the evidence by challenging the search warrant on the grounds that: 1) "the search warrant was so overly broad and unparticularized that it constituted an impermissible general warrant"; and 2) the "application failed to provide the necessary indicia of probable cause that a crime had been committed and was tainted by material misstatements and omissions." (Dkt. No. 47-1).

A. Particularity & Breadth

First, Defendant argues that the warrant is "unconstitutionally overbroad, unparticularized, and facially invalid." (Dkt. No. 47-1, p. 11). The Fourth Amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. "A warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity." *United States v. Galpin*, 720 F.3d 436, 445 (2d Cir. 2013) (quoting *Kentucky v. King*, 131 S.Ct. 1849, 1856 (2011)). "To

satisfy the particularity requirement of the Fourth Amendment, the warrant must (1) identify the specific offense for which the police have established probable cause; (2) describe the place to be searched; and (3) specify the items to be seized in connection with the cited crimes." *Galpin*, 720 F.3d at 445–46. In other words, "a warrant must be sufficiently specific to permit the rational exercise of judgment by the executing officers in selecting which items to seize." *United States v. Wey*, F. Supp. 3d 355, 380 (S.D.N.Y. 2016) (internal quotation marks omitted) (citing *United States v. Shi Yan Liu*, 239 F.3d 138, 140 (2d Cir. 2000)).

The Second Circuit has also cautioned that "where . . . the property to be searched is a computer hard drive, the particularity requirement assumes even greater importance" because physical "limitations are largely absent in the digital realm, where the size or other outwardly visible characteristics of a file may disclose nothing about its content." *See Galpin*, 720 F.3d at 446, 447. Since evidence of a crime may be intermingled with millions of innocuous files, there is an increased threat of a general search. *Id.* "This threat demands a heightened sensitivity to the particularity requirement in the context of digital searches." *Id*. at 447.

Defendant argues that the search warrant lacks particularity because "it authorizes officers to search for evidence of four entire articles of the New York State Penal law encompassing 47 distinct crimes, and thus fails to identify the 'specific offense for which the police have established probable cause.'" (Dkt. No. 47-1, p. 14) (citing *Galpin*, 720 F.3d at 445). Defendant refers to the portion of the warrant authorizing search for evidence of "violations of Articles 130/235/263/260 of the Penal Law of the State of New York." (Dkt. No. 47-3, p. 1). While this language is not as open-ended as the warrant in *Galpin* (authorizing search for evidence of violations of NYS Corrections Law, section 168–f subdivision four, NYS

Penal Law and/or Federal Statutes), it nonetheless fails to identify the specific crime(s) for which evidence is sought.

As discussed below, the warrant application package provided sufficient facts for a finding of probable cause that Defendant engaged in crimes related to sexual abuse of a minor and child pornography. However, the warrant itself did not specify these crimes. And the Court cannot consider the rest of the application package because "the Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) ("The fact that the *application* adequately described the 'things to be seized' does not save the *warrant* from its facial invalidity."). A warrant may only be construed with reference to a supporting application or affidavit "if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *In re 650 Fifth Avenue and Related Properties*, 830 F.3d 66, 99-100 (2d Cir. 2016) (quoting *Groh*, 540 U.S. at 557–58). Here, the warrant did not incorporate the application or affidavit by reference or attach the application to the warrant, and so those sources cannot refine its particularity.

Looking at the warrant on its own, Defendant is correct that it "does not identify a single, discrete criminal statute." (Dkt. No. 47-1, p. 14). The executing officers were authorized to search for evidence of violations of Penal Law Articles 130, 235, 260, and 263. (Dkt. No. 47-3, p. 1). However, nothing on the face of the warrant further describes "the specific offense for which the police have established probable cause." *See Galpin*, 720 F.3d at 445–46. The warrant fails to limit the scope of the search to only include crimes related to sexual abuse of a minor and child pornography. For example, the warrant could have specified the following crimes: 1) Rape in the Second Degree (N.Y. Penal Law § 130.30); 2) Endangering the Welfare of a Child (N.Y. Penal Law § 260.10); 3) Use of a Child in a Sexual Performance (N.Y. Penal

Law § 263.05); 4) Possessing an Obscene Performance by a Child (N.Y. Penal Law § 263.11); and 5) Possessing a Sexual Performance by a Child (N.Y. Penal Law § 263.16). Instead, the warrant permitted officers to search for and seize evidence of 47 different crimes within Articles 130, 235, 260, and 263—many which are completely unrelated to the evidence in the warrant application, such as offenses involving vulnerable elderly persons. (*See* Dkt. No. 47-1, pp. 7–8).

In sum, the Court concludes that "nothing on the face of the warrant tells the searching officers for what crime the search is being undertaken." *See United States v. George*, 975 F.2d 72, 76 (2d Cir. 1992). The warrant by itself is not specific enough to permit the rational exercise of judgment by the executing officers in selecting which items to seize. Therefore, the warrant fails the particularity requirement. *See United States v. Rosa*, 626 F.3d 56, 62 (2d Cir. 2010) (finding warrant invalid where it authorized seizure of electronic equipment without specifying the legal violation and thus "provided [officers] with no guidance as to the type of evidence sought"); *see also United States v. Zemlyansky*, 945 F. Supp. 2d 438, 454 (S.D.N.Y. 2013) (finding that a search warrant violated the particularity requirement where, *inter alia*, there was nothing on the face of the warrant to "inform[] the searching officer for which crimes the search is being undertaken"). Similarly, the Court finds the warrant is overbroad because it includes crimes among Articles 130/235/260/263 for which there was no probable cause. *See Wey*, 256 F. Supp. 3d at 393 (S.D.N.Y. 2017) ("breadth and particularity are related but distinct concepts") (citation omitted). For these reasons, the warrant is defective and invalid, and the Court must consider whether the fruits of the search should be suppressed.

B. Good Faith Exception

Even when a search warrant is later found invalid, the seized evidence may still be admitted if the officers performed the search in "objectively reasonable reliance" on the warrant.

See United States v. Raymonda, 780 F.3d 105, 118 (2d Cir. 2017); *see also United States v. Leon*, 468 U.S. 897, 922–23 (1984). "Searches pursuant to a warrant will rarely require any deep inquiry into their reasonableness." *Leon*, 468 U.S. at 922 (citing *Illinois v. Gates*, 462 U.S. 213, 267 (1983)). This is because when an "alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner." *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2011). However, the mere presence of a warrant "does not end the inquiry into objective reasonableness." *Id*. at 547. The Court's inquiry is "confined to the objectively ascertainable question of whether a reasonably well-trained officer would have known that the search was illegal" in light of all the circumstances. *See United States v. Buck*, 813 F.2d 588, 592 (2d Cir. 1987) (quoting *Leon*, 468 U.S. at 922 n.23). The Supreme Court has identified four circumstances where this good faith exception does not apply:

> (1) where the issuing magistrate has been knowingly misled; (2) where the issuing magistrate wholly abandoned his or her judicial role; (3) where the application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; and (4) where the warrant is so facially deficient that reliance upon it is unreasonable.

Galpin, 720 F.3d at 452 (quoting *United States v. Moore*, 968 F.2d 216, 222 (2d Cir. 1992)).

The Government posits that even if the warrant was faulty, suppression is not warranted because it was executed in good faith. (Dkt. No. 50, p. 17). Defendant argues that the good faith exception does not apply here because the issuing judge was knowingly misled, and the warrant is so facially deficient that reliance was unreasonable. (Dkt. No. 47-1, pp. 25–26). The Court will address each argument in turn.

1) The Town Justice Was Not Knowingly Misled

Defendant argues that affidavit supporting the warrant "contained material misstatements and omissions that were relied upon by the issuing Town Justice to find probable cause for the search warrant." (*Id.*, pp. 20–25). Defendant contends that the alleged misstatements and omissions were intended to bolster the odds of obtaining a search warrant. (*Id.*, p. 24). Defendant seeks a *Franks* hearing "to test the veracity of the statements made in the search warrant application." (*Id.*, p. 25).

When a defendant challenges the veracity of an affirmation used to procure a warrant, he may obtain a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), but only upon a "'substantial preliminary showing' that a deliberate falsehood or statement made with reckless disregard for the truth was included in the warrant affidavit and the statement was necessary to the judge's finding of probable cause." *United States v. Falso*, 544 F.3d 110, 125 (2d Cir. 2008) (citing *Franks*, 438 U.S. at 155–56, 170–171). "To determine whether a misstatement or omission is necessary to the finding of probable cause, *i.e.*, whether it is material, we look to a hypothetical 'corrected affidavit,' produced by adding to the original warrant affidavit the omitted information highlighted by defendant, as well as any other pertinent omitted information." *United States v. Stitsky*, 536 F. App'x 98, 104 (2d Cir. 2013).

In this case, the Court finds that Defendant has not made a substantial preliminary showing that a deliberate falsehood or statement made with reckless disregard for the truth was included in the warrant affidavit. First, Defendant points out that the affidavit "omits any mention that the complaint by the informant was made prior to his receiving [the Defendant's] just kidding message." (Dkt. No. 47-1, p. 24). However, the warrant application included the full Facebook conversation, including the "just kidding" comment. (Dkt. No. 47-4, p. 14). In

addition, that comment—made three hours after Defendant sent the photograph of the minor male and messages implying sexual contact (which did not elicit a response from the Witness)—could be viewed as an attempt to walk back his admission to a serious crime. Thus, under the circumstances, the Court finds that the omission does not suggest any intent to mislead, nor was it material to the finding of probable cause. *See Falso*, 544 F.3d at 125.

Next, Defendant claims that the affidavit "falsely avers that the child is sitting on *Brandon's* chest with his 'buttocks exposed.'" (Dkt. No. 47-1, p. 23). Defendant points out that the adult male in the photograph is not identifiable. (*Id.*). However, there is no dispute that Defendant sent the photograph to the Witness and claimed that he had taken the picture while "spending time" and "playing with" his friend's ten-year-old son. (Dkt. No. 47-4, pp. 13–14). Thus, it was reasonable for Investigator Smith to infer that Defendant was the adult male in the photograph. Under the circumstances, there is no basis to find that Investigator Smith's representation was a deliberate falsehood or statement made with reckless disregard for the truth. Moreover, even if the photograph had been described as depicting an "unidentified adult male," it would have been equally reasonable for the Town Justice to infer that Defendant was in the photograph based on the context of the Facebook conversation. In other words, Investigator Smith's identification of Defendant in the photograph was not necessary to the judge's finding of probable cause. Therefore, this statement also does not warrant a *Franks* hearing.[1]

Further, Defendant argues that "the reference to the child's buttocks being 'exposed' is clearly intended to suggest a more obvious and flagrant display than that which is actually visible in the photograph." (Dkt. No. 47-1, p. 23). As part of the warrant application,

[1] While Defendant claims that he found the photograph on the Internet, he has not submitted any such evidence to show that it was some other person in the photograph, much less evidence that Investigator Smith knew that it was not Defendant in the photograph at the time of the warrant application.

Investigator Smith attached a redacted version of the photograph, which blacked-out the minor male's face and the area below his waist. (Dkt. No. 47-4, p. 14). These redactions required the Town Justice to rely on Investigator Smith's description that the buttocks of the minor male were "exposed." (*See id*., p. 8). The Court has reviewed an unredacted version of the photograph and finds that Investigator Smith's description of the minor male was not misleading. It is clear that the minor male is naked from the waist down and the side of his buttocks are visible. While the term "exposed" may suggest a more explicit photograph, it is not inaccurate. And even if the warrant application was reconstructed—without any redactions to the photographs, and with corrections to the alleged misstatements and omissions in the affidavit—the Court finds that the overall facts would still support a finding of probable cause for crimes related to sexual abuse of a minor and child pornography.

In sum, there is no basis to find that the Town Justice was knowingly misled, and Defendant's request for a *Franks* hearing is denied for the same reason.

2) Reliance Upon the Warrant was Reasonable

Finally, Defendant argues that "the circumstances show that no reasonably well-trained officer could have objectively relied upon the facially invalid search warrant in good faith." (Dkt. No. 47-1, p. 25). "The burden is on the government to demonstrate the objective reasonableness of the executing officer's good faith reliance on the invalid warrant." *United States v. Ganias*, 824 F.3d 199, 236 (2d Cir. 2016) (quoting *United States v. Voustianiouk*, 685 F.3d 206, 215 (2d Cir. 2012)). "When agents act in good faith, the exclusionary rule will usually not apply." *Id.* In other words, "evidence will be suppressed only where the benefits of deterring the Government's unlawful actions appreciably outweigh the costs of suppressing the evidence—'a high obstacle for those urging . . . application' of the rule." *Id.* at 236–37 (quoting

Herring v. United States, 555 U.S. 135, 141 (2009)). When deciding whether to suppress evidence, the Court must determine "whether 'police conduct is sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.'" *Rosa*, 626 F.3d at 64 (quoting *Herring*, 555 U.S. at 144).

Although the Court may not consider the unincorporated, unattached warrant application to evaluate the viability of the warrant, "those documents are still relevant to our determination of whether the officers acted in good faith, because they contribute to our assessment of the officers' conduct in a particular case." *Id*. In *Rosa*, on appeal from a decision by this Court, the Second Circuit declined to suppress evidence seized with a defective warrant where the circumstances evinced good faith and the benefits of deterrence did not outweigh the costs. The Circuit emphasized that "the search warrant application, [the investigator's] affidavit, and the documents incorporated by the affidavit make clear that the purpose of the search was to obtain evidence of child pornography and child molestation." *Id.* at 65. The Circuit also noted that:

> Moreover, as both the affiant and the officer in charge of executing the search warrant and later searching the digital media seized, Investigator Blake was intimately familiar with the contemplated limits of the search. Finally, there is no evidence that the team of officers searched for, or seized, any items that were unrelated to the crimes for which probable cause had been shown, or that Investigator Blake somehow misled the town justice regarding the facts of the investigation and intended scope of the search.
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> * * * *
>
> Because there is no evidence that Investigator Blake and his team of officers actually relied on the defective warrant, as opposed to their knowledge of the investigation and the contemplated limits of the town justice's authorization, in executing the search, the requisite levels of deliberateness and culpability justifying suppression are lacking.

Id. at 65–66. The Circuit concluded that the circumstances surrounding the investigation and application for the warrant, executed by a team led by the application's affiant, "demonstrate that the officers proceeded as though the limitations contemplated by the supporting documents were

present in the warrant itself, and, as a result, their actions 'bear none of the hallmarks of a general search.'" *Id.* at 66 (citing *Liu*, 239 F3d at 141).

The same is true here. Based on the totality of the circumstances, it is evident that the search followed the specific contours of the warrant application—seeking evidence of crimes related to sexual abuse of a minor and child pornography. The affidavit detailed Defendant's conversation about a 10-year-old child, the photograph he sent, and the implied sexual contact—clearly supporting a finding of probable cause for sexual abuse of a minor. Defendant argues that the photograph could not have provided "probable cause that [he] possessed or distributed child pornography inasmuch as the image itself was not child pornography." (Dkt. No. 47-1, p. 22). The Government concedes that the photograph is not child pornography. (Dkt. No. 50, p. 14). Indeed, the warrant affidavit does not assert that the photograph is child pornography. However, the photograph added to the overall context in the application package, which included Defendant's messages implying sexual contact with the minor male. (Dkt. No. 47-4, pp. 13–14). Based on the photograph and those messages, it was reasonable to infer that Defendant had taken other photographs of the minor male depicting sexually explicit poses and/or conduct which could constitute child pornography. Thus, in addition to sexual abuse of a minor, there was also probable cause for possession of a sexual performance by a child (N.Y. Penal Law § 263.16). Both crimes are referenced in the concluding section of the affidavit, (Dkt. No. 47-4, pp. 8–9), and fall within the Articles enumerated in the warrant itself. (Dkt. No. 47-3, p. 1).

In addition, the failure to specify these precise crimes in the search warrant or incorporate the application, while error, did not lead a general search for evidence of any criminal activity. The supporting affidavit shows that the search was intended to narrowly target

evidence of crimes related to sexual abuse of a minor and child pornography. (*See* Dkt. No. 47-4, pp. 8–9); *see also Rosa*, 626 F.3d at 65. It is also significant that Investigator Smith (a member of the CPD's Computer Crimes Unit and Child Exploitations Task Force), both applied for and executed the warrant, so he was "intimately familiar" with the details of the case and the "contemplated limits of the search." *See id*. And the search team consisted of members of the Albany FBI Child Exploitation Task Force. As a result, no items were seized other than Defendant's laptop and smartphone, (Dkt. No. 47-5), both of which were foreseeably connected to the suspected crimes.

Further, applying the exclusionary rule in this case would serve little deterrent purpose. The deterrent value of exclusion is strong "when the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights." *Ganias*, 824 F.3d at 237. The circumstances in this case do not suggest malintent or gross negligence. While the warrant should have been more specific, it did identify four articles of the New York Penal law which include a number of crimes for which there was probable cause, as discussed above. Thus, the defects in the warrant do not preclude good faith reliance, particularly given the clarifying warrant application. Moreover, the record shows that the warrant was executed as though the limitations contemplated by the supporting affidavit were present in the warrant, and thus the search bears none of the hallmarks of a general one. *See Rosa*, 626 F.3d at 66.

In sum, the Court finds that the warrant was not so facially deficient that reliance upon it was unreasonable, and crucially, the costs of suppression outweigh the benefits of deterrence. Accordingly, the good faith exception applies in this situation, and suppression is not warranted. *See also United States v. Romain*, 678 F. App'x 23, 25–26 (2d Cir. 2017) (affirming decision to deny motion to suppress evidence, noting that the defendant "advances no argument that law

enforcement's failure to cite the relevant criminal statutes or timeframe in the warrant when contemporaneously submitted supporting documents included this information was 'sufficiently deliberate that exclusion can meaningfully deter [such a failure], and sufficiently culpable that such deterrence is worth the price paid by the justice system'") (quoting *Herring*, 555 U.S. at 144); *see also United States v. Westley*, No. 3:17-CR-171, 2018 WL 3233134, at *12, 2018 U.S. Dist. LEXIS 109909, at *36 (D. Conn. July 2, 2018) ("If the warrant itself had some technical deficiencies, none of these rendered it so deficient as to render the officers' reliance on it unreasonable or in bad faith. While the warrant itself did not specify that the items seized had to be evidence of particular offenses, the affidavit submitted with the warrant application does contain that information.").

IV. CONCLUSION

For these reasons, it is

ORDERED that Defendant's motion to suppress evidence and dismiss the Indictment (Dkt. No. 47) is **DENIED**.

IT IS SO ORDERED.

Dated: July 22, 2019
Syracuse, New York

Norman A. Mordue
Senior U.S. District Judge